

February 16, 2012

FILED/ACCEPTED

Ryan W. King
RKing@PattonBoggs.com

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

FFR 16 2012
Federal Communications Commission
Office of the Secretary

Re: Petition for Expedited Declaratory Ruling; CG Docket No. 02-278
SoundBite Communications, Inc.

Dear Ms. Dortch:

On behalf of SoundBite Communications, Inc. ("SoundBite"), please find enclosed the original and four copies of SoundBite's Petition for Expedited Declaratory Ruling (CG Docket No. 02-278).

An extra copy of the Petition also is enclosed. Please stamp this "stamp-in" copy as received and return it to the courier. If you have any questions regarding this filing, please do not hesitate to contact me at (202) 457-5312 or rking@pattonboggs.com.

Sincerely,



Ryan W. King
Associate

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

FEB 16 2012

Federal Communications Commission
Office of the Secretary

In the Matter of)

SoundBite Communications, Inc.)

Petition for Declaratory Ruling)

CG Docket No. CG 02-278

To: The Commission

Petition for Expedited Declaratory Ruling

SoundBite Communications, Inc. (“SoundBite”), through counsel, and pursuant to Section 1.2 of the Federal Communication Commission’s (“Commission” or “FCC”) rules,¹ respectfully petitions the Commission to issue a Declaratory Ruling on a narrow issue with significant implications. SoundBite requests an FCC declaration that when a subscriber sends a text message choosing to opt-out of receiving future text messages from a SoundBite client, and a one-time immediate reply is sent back via text message to that customer confirming the opt-out request, that confirmation message is not a violation of the Telephone Consumer Protection Act (“TCPA”)² or Section 64.1200 of the Commission’s rules.³

Unfortunately, SoundBite and other companies have been targeted with multi-million dollar class action lawsuits based on these one-time confirmation messages. The lawsuits allege that these single confirmation text messages are a violation of the TCPA. In fact, there have been at least twelve lawsuits filed on this matter, including against well known companies such

¹ 47 C.F.R. § 1.2.

² Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2000 & Supp. 2005) (“TCPA”).

³ 47 C.F.R. § 64.1200.

as Red Box, American Express, Barclay's Bank, Citibank, Nascar, NFL, and Gamestop.⁴ As a result of these lawsuits, and additional lawsuits that have been threatened, companies that lawfully utilize mobile marketing strategies to sustain and grow their businesses are exposed to hundreds of millions of dollars of potential liability, and that exposure is growing by the day.

I. BACKGROUND

SoundBite, founded in 2000, is a publicly traded company headquartered in Bedford, Massachusetts, with additional offices in Irvine, Dallas and London, UK. SoundBite specializes in customer communications, and works with a wide range of other companies, including banks, retailers, utilities, and wireless operators, to send text messages and other messages on their behalf. SoundBite has approximately 400 end-user clients, including many Fortune 500 companies.

As a matter of consumer best practices, and consistent with general FCC direction⁵ and specific industry guidelines⁶ on opt-out confirmations, SoundBite sends an immediate confirmation reply message when a consumer sends a request to stop receiving future text messages from a SoundBite client. The Mobile Marketing Association ("MMA"), a non-profit trade association representing 600 companies in over forty countries around the world,

⁴ See e.g., *Annoni v. FYIsms.com, LLC*, Case No. 11-cv-1603 (N.D. Ill.); *Emanuel v. NFL Enterprises, LLC*, 11-cv-1781 (S.D. Cal.); *Gutierrez et al. v. Barclays Group et al.*, Case No. 10-cv-1012 (S.D. Cal.); *Holt v. Redbox Automated Retail, LLC*, Case No. 11-cv-3046 (S.D. Cal.); *Jaber v. Nascar Holdings, Inc.*, Case No. 11-cv-1783 (S.D. Cal.); *Karayan v. GameStop Corp. and GameStop, Inc.*, Case No. 11-cv-1777 (S.D. Cal.); *Lo v. Oxnard European Motors, LLC et al.*, Case No. 11-cv-1009 (S.D. Cal.); *Maleksaeedi v. American Express Centurion Bank*, Case No. 11-cv-790 (S.D. Cal.); *Ryabyshchuk v. Citibank*, Case No. 11-cv-1236 (S.D. Cal.).

⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 03-153, 18 FCC Rcd 14014, ¶ 93 (2003) ("2003 TCPA Order").

⁶ See Mobile Marketing Association, U.S. Consumer Best Practices, Version 6.0, § 1.6 (March 1, 2011), available at mmaglobal.com/bestpractices.pdf. ("MMA Best Practices").

emphasizes the importance of sending such a confirmation of consumer opt-out requests.

Pursuant to the MMA Consumer Best Practices guidelines, if a consumer opts out of receiving future text messages from a company, the company is required to send that consumer a confirmation text message confirming his or her request to opt-out.⁷ Wireless operators, aggregators and CTIA-The Wireless Association® require companies such as SoundBite to follow the MMA best practices before they will enable and allow text messaging campaigns on their networks. Therefore, when a SoundBite client receives an opt-out request from an individual subscriber, SoundBite processes that request and, as recommended by the MMA, and as required by the wireless operators, sends a one-time confirmation text message to that individual subscriber within minutes of receipt of the opt-out request. The reply message confirms that the request was received and that the subscriber requesting the opt-out will no longer receive text messages from that company.

II. ONE-TIME TEXT MESSAGE OPT-OUT CONFIRMATIONS, SENT WITHIN MINUTES OF RECEIPT OF THE REQUEST, DO NOT VIOLATE THE TCPA

One-time confirmation text messages, sent within minutes of receipt of the request, and sent only to those consumers requesting the opt-out, are not a violation of the TCPA or the Commission's rules. Such messages fall under the grace period that the FCC has applied to TCPA opt-out requests. They are targeted messages and are not sent through an automatic telephone dialing system. Furthermore, such confirmation messages are in the public interest and consistent with sound public policy.

⁷ MMA Best Practices at § 1.6.

A. SoundBite's Confirmation Text Messages Fall Under the Applicable Grace Period for TCPA Opt-Out Requests

The Commission allows telemarketers up to 30 days after an opt-out request is made to remove the phone numbers from their systems.⁸ The FCC has stated that text messages are “calls” under the TCPA. Because the FCC treats texts as calls, the 30-day grace period for opt-out requests that the FCC applies to voice calls must equally apply to text messages. It is also reasonable for the FCC to take into account that because a system processing text opt-out requests may work more quickly than a voice-based system, a shorter time period could apply. In choosing 30 days as the appropriate grace period for calls, the FCC took into account the varying capabilities of different entities, depending on their size:

[W]e decline to amend the timeframe by which telemarketers must honor do-not-call requests. In concluding that telemarketers must honor such requests within 30 days, we considered both the large databases of such requests maintained by some entities and the limitations on certain small businesses. We also determined that telemarketers with the capability to honor company-specific do-not-call requests in less than thirty days must do so.⁹

The FCC also chose to apply a 30-day grace period for opt-out requests related to facsimiles: “[T]he recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to

⁸ See 2003 TCPA Order, Appendix B at ¶ 32 (“[W]e determined to require that both large and small businesses must honor do-not-call requests within 30 days from the date such a request is made, instead of requiring that businesses honor requests in less time.”)(emphasis added); see also FCC Guide: Unwanted Telephone Marketing Calls, available at <http://www.fcc.gov/guides/unwanted-telephone-marketing-calls> (“Telemarketers covered by the National Do-Not-Call Registry have up to 31 days from the date that you register your telephone number to remove it from their call lists and stop calling you.”)(emphasis added).

⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Second Order on Reconsideration, FCC 05-28, 20 FCC Rcd 3788, ¶ 22 (2005) (“2005 TCPA Second Order on Reconsideration”).

comply, within 30 days, with such a request meeting the requirements under paragraph (a)(3)(v) is unlawful.”¹⁰

SoundBite defers to the FCC regarding what would be the appropriate grace period for text messages. Whatever grace period the FCC ultimately chooses to apply to text messages, SoundBite seeks a declaration that the one-time confirmation text message that SoundBite sends within minutes of receiving an opt-out request should fall within the applicable grace period.

B. SoundBite’s Confirmation Text Messages Are Not Sent Using an Automatic Telephone Dialing System

The lawsuits allege that because SoundBite and its client companies send an automatic confirmation to subscribers requesting an opt-out, the confirmation messages are sent through an "automatic dialing system" as defined by the TCPA. This is incorrect. As explained below, the system used by SoundBite to send opt-out confirmations is not an "automatic dialing system." Accordingly, there is no violation of the TCPA or the Commission's rules.

Pursuant to the TCPA and the Commission’s implementing rules, calls made to a wireless telephone number using an automatic telephone dialing system are prohibited:

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice— . . .

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call; . . .¹¹

¹⁰ 47 C.F.R. § 64.1200(a)(3)(iii)(B)(emphasis added).

¹¹ 47 U.S.C § 227(b)(1)(A)(iii); *see also* 64.1200(a)(1)(iii).

An automatic telephone dialing system is “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”¹² SoundBite’s automatic confirmatory response does not have the capacity to “store or produce telephone numbers to be called, using a random or sequential number generator.” The software used to send SoundBite’s confirmation text messages to those individuals requesting an opt-out does not allow random or sequential calls. The software only allows confirmation messages to those consumers specifically requesting an opt-out.

The FCC has specifically recognized that it must evaluate capacity in the context of hardware as it is programmed with software.¹³ For the SoundBite system, when a consumer replies to a text with “STOP” or other appropriate opt-out keyword from their mobile device, the SoundBite system receives the stop request along with the mobile number from which it originated. The system is programmed to put the individual number on a separate list (a type of “do not text” list), with a one-time confirmation text message sent only to that number. The SoundBite system has absolutely no capacity to store, look-up, or dial in any random or sequential order – there is only a precise, one-time response to an individual subscriber’s opt-out text message request that goes only to the specific device through which the opt-out request was made.

Moreover, the FCC has explained that calling numbers that are “not generated in a random or sequential fashion” falls outside the TCPA’s prohibitions.¹⁴ The individual

¹² 47 U.S.C. § 227(a)(1); 64.1200(f)(1).

¹³ 2003 TCPA Order at ¶ 131 (“The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers.”).

¹⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 92-443, 7 FCC Rcd 8752, ¶ 47 (1992) (“1992 TCPA Order”) (stating that the

confirmation messages sent by SoundBite are not generated in any random or sequential fashion. These are immediate replies sent directly to those individual consumers requesting the opt-out, acknowledging and confirming their opt-out request.

In summary, the SoundBite system does not have the capacity to generate and send confirmations of opt-out requests in a random or sequential order; nor are the opt-out confirmations either random or sequential. Accordingly, SoundBite's confirmations do not violate the TCPA.

C. Sending One-Time Confirmation Text Messages Is Consistent With Good Public Policy

Opt-out confirmations are consistent with good consumer policy and promote the public interest. The FCC itself has expressed the importance of consumers receiving some type of confirmation that a company has received their opt-out request, specifically emphasizing that telemarketers should confirm that they have recorded a confirmation request at the time the consumer makes an opt-out request:

We decline at this time to require telemarketers to make available a toll-free number or website that would allow consumers to register company-specific do-not-call requests or verify that such a request was made with the marketer. We also decline to require telemarketers to provide a means of confirmation so that consumers may verify their requests have been processed at a later date. Telemarketers should, however, confirm that any such request will be recorded at the time the request is made by the consumer.¹⁵

Also, the MMA, in conjunction with all major mobile operators in the United States, has emphasized that opt-out confirmations are good, consumer-friendly practices. The MMA published the Consumer Best Practices as a guideline for business usage of text messaging.

prohibitions of the TCPA “clearly do not apply to functions like ‘speed dialing,’ ‘call forwarding,’ or public telephone delayed message services (PTDMS) because the numbers called are not generated in a random or sequential fashion.”).

¹⁵ 2003 TCPA Order at ¶ 93 (emphasis added).

Pursuant to these Consumer Best Practices, when a company receives an opt-out request via text, the phone number must be opted-out of the system and the program must respond with a confirmation text message stating that the consumer has been opted-out of the campaign and will no longer receive any messages from that entity.¹⁶ Indeed, the CTIA Compliance Monitoring and Enforcement Playbook, which serves as the basis for industry audits of SMS text messages, specifically lists “[f]ailure to confirm service termination” in response to a user opt-out message as a compliance violation.¹⁷

The mobile industry has widely endorsed opt-out confirmation text messages as a best practice, as a superior consumer experience, and as being compliant with federal and state laws. CTIA (which has represented the wireless communications industry since 1984), in its testimony before the House Subcommittee on Communications & Technology regarding the Mobile Informational Call Act of 2011, stated:

As with efforts to obtain express consent and protect user privacy through the use of double opt-in mechanisms, acknowledging receipt of a “STOP” message by sending the customer a text message is a reasonable business practice that provides consumers with confirmation that their request has been received, and those who employ it should not become targets for litigation.¹⁸

Moreover, such one-time confirmation text messages are not what the TCPA was aimed at preventing. As the FCC explained, the TCPA was enacted to eliminate calls that cause consumers to feel annoyed by “hang-ups” or “dead air,” or feel “frightened, threatened and

¹⁶ MMA Best Practices at § 1.6-4 (“When STOP, or any of the opt-out keywords above, is sent to a program, the program must respond with an MT [mobile-terminated] message, whether or not the subscriber is subscribed to the program.”).

¹⁷ CTIA Compliance Monitoring and Enforcement Playbook (Oct. 25, 2011), *available at* http://www.wmcglobal.com/images/CTIA_playbook.pdf.

¹⁸ House Energy and Commerce Subcommittee on Communications & Technology Hearing, “H.R. 3035, The Mobile Informational Call Act of 2011,” Testimony of Michael Altschul, General Counsel, CTIA (November 4, 2011).

harassed.”¹⁹ The TCPA was also enacted to protect the public from unwanted privacy intrusions and from disruptions to essential public safety services caused by random or sequential number generators jamming PBXs and flooding local exchanges.²⁰ None of these concerns are implicated by the prompted and isolated SoundBite confirmation text messages.

III. CONCLUSION

The type of immediate, one-time reply messages sent by SoundBite to confirm a subscriber’s opt-out request is consistent with the TCPA and consistent with the public interest. SoundBite respectfully requests an expedited declaratory ruling that such messages do not violate the TCPA.

Respectfully submitted,

SoundBite Communications, Inc.

By: 

Robert Leahy
John Tallarico
SoundBite Communications, Inc.
22 Crosby Drive
Bedford, MA 01730

Monica Desai
Patton Boggs LLP
2550 M Street NW
Washington, DC 20037
(202) 457-7535

Its Counsel

Dated: February 16, 2012

¹⁹ 2003 TCPA Order at ¶ 2 (emphasis added).

²⁰ See S. REP. NO. 102-178 at 5 reprinted in 1991 U.S.C.C.A.N. 1968, 1972-73 (1991) (“The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.”).